

**IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF VIRGINIA  
ROANOKE DIVISION**

**WACHOVIA BANK, N.A.,  
Administrator of the Estate of  
Susan Hale Young, Deceased,**

**Plaintiff,**

**v.**

**RELLA BOURN, et al.,**

**Defendants.**

**Civil Action No. 7:02CV00773**

**MEMORANDUM OPINION**

**By: Samuel G. Wilson  
Chief United States District Judge**

This is a wrongful death action by plaintiff, Wachovia Bank, N.A. , the administrator of the estate of Susan Hale Young (the “estate”), against Twin Laboratories Inc.,<sup>1</sup> the manufacturer of a dietary weight loss supplement containing ephedra, sold under the trade name “Thermo-Lift,” and against a Twin Laboratories’ distributor, Rella Bourn. The estate filed suit in state court, and defendants removed the case to this court pursuant to 28 U.S.C. § 1447(c). The matter is before the court on Wachovia’s motion to remand on the ground that complete diversity is lacking because the beneficiaries of the estate and Bourn are Virginia citizens. The court finds that there is no basis to hold Bourn liable and that the estate has joined Bourn solely for the purpose of defeating diversity jurisdiction. Accordingly, the court finds complete diversity and denies Wachovia’s motion to remand.

**I.**

In April 1996, Susan Hale Young submitted a “distributor application and agreement” to

---

<sup>1</sup>TwinLab Corporation, the parent entity of Twin Laboratories, and TwinLab Direct, Inc., an affiliate, are also parties to this action. Hereinafter, the three corporations will collectively be referred to as Twin Laboratories.

become a new distributor for Changes International (“Changes”), which sells a host of products including Thermo-Lift, marketed as a weight loss supplement.<sup>2</sup> The application provided that if accepted, Changes would pay Young commissions on sales made by other Changes distributors Young personally recruited. The application identified Bourn as Young’s “sponsor.” Changes accepted Young’s application, and over the next three years, Young distributed Changes’ products including Thermo-Lift. She also took Thermo-Lift to “boost” her energy. Earlier, Bourn entered into an agreement with Changes similar to Young’s agreement, and therefore, Changes paid Bourn commissions on Young’s sales.

On June 12, 1999, Young died suddenly and unexpectedly. Her estate filed suit in state court alleging that Thermo-Lift caused her death. The estate also alleges that Bourn sold Young the Thermo-Lift that caused Young’s death and that Bourn, as well as Twin Laboratories, is liable.

Bourn, a Virginia citizen, and Twin Laboratories, a Delaware corporation with its principal place of business in that state, removed the suit from state court claiming that this court has diversity jurisdiction. All of the beneficiaries of Young’s estate are Virginia citizens.<sup>3</sup> Because the beneficiaries of Young’s estate and Bourn are Virginia citizens, this court lacks diversity jurisdiction if the estate properly joined Bourn as a defendant. The estate maintains that it properly joined Bourn and moves to remand this case to the state court.

---

<sup>2</sup>During the time that Young worked as a distributor and used Thermo-Lift, Changes International was a subsidiary of TwinLab Corp.

<sup>3</sup>When the statutory beneficiaries and the defendants in a wrongful death action are citizens of different states, the district court has jurisdiction regardless of the citizenship of the plaintiff administrator. Krier-Hawthorne v. Beam, 728 F.2d 658, 660 (4th Cir. 1984).

Bourn has filed an affidavit stating that although she received commissions on products Young purchased, once Young became a distributor for Changes, Young placed all orders directly with Changes. Therefore, according to Bourn, Bourn did not sell Young the Thermo-Lift that the estate alleges caused Young's death. The estate responds that "Virginia law supports actual recovery, and certainly presents the possibility of recovery, against Bourn based upon her distribution of Thermo-Lift to the decedent." Pl.'s M. to Remand P. 5. To support its argument the estate relies on Bourn's distributor agreement with Changes which, like Young's agreement, provides for commissions on purchases by distributors whom she personally recruits. It follows, the estate argues, that even though Young also was a distributor and purchased Thermo Lift directly from Changes, for all intents and purposes, Bourn distributed or sold the Thermo Lift to Young. The estate concedes that this theory of recovery is all it is able to advance to hold Bourn liable.

## II.

"Diversity jurisdiction may not be defeated by joinder of [a] nondiverse defendant who cannot conceivably be liable." Edmond v. Food Lion, Inc., 895 F. Supp. 103 (E.D. Va. 1994). For there to be diversity jurisdiction despite the existence of a nondiverse defendant, the defendants must prove either 1) that there exists no possibility that Ms. Bourn could be held liable for any alleged injury to the plaintiff; or 2) "that there has been outright fraud in plaintiff's pleading of jurisdictional facts." Marshall v. Manville Sales Corp., 6 F.3d 229, 232 (4th Cir. 1993) (citations omitted).<sup>4</sup> In making this determination, the court may "consider the entire

---

<sup>4</sup>There is no suggestion that Wachovia committed outright fraud in its pleading of jurisdictional facts, and thus the court does not consider it.

record and determine [a] basis of joinder by any means available.” Aids Counseling Testing Centers v. Group W Television, Inc., 903 F.2d 1000, 1004 (4th Cir. 1990) (citations omitted). If there is even a slight possibility that the estate can recover, defendants cannot carry their burden, and this court must remand the case to state court. Hartley v. CSX Transp., Inc., 187 F.3d 422 (4th Cir. 1999).

This heavy burden effectuates “Congress’ clear intention to restrict removal and to resolve all doubts about the propriety of removal in favor of retained state court jurisdiction.” Marshall, 6 F.3d at 232. This standard acknowledges the plaintiff’s right to frame his pleadings in a manner that controls the removability of his case throughout the litigation. James F. Archibald, III, Reintroducing “Fraud” to the Doctrine of Fraudulent Joinder, 78 Va. L. Rev. 1377, 1384 (1992). It is equally fundamental that the interests of judicial efficiency would not be served, if the case were to continue in federal court only to be voided on appeal for lack of complete diversity. Id. at 1385. Nevertheless, the court has a “duty to preserve federal jurisdiction where it is proper to do so.” Id. at 1386.

With these precepts in mind, the court finds that Bourn is not a proper party to this action. The court rejects the notion that the receipt of commissions on another’s sales transforms the person who receives those commissions into a seller or the seller’s agent for those sales. Bourn did not hold or transfer title to the goods that Young purchased and received directly from Changes, did not assist in making the sales, and had no responsibility for them. Nor does Bourn’s receipt of commissions on Young’s purchases forecast any other theory of liability.<sup>5</sup> In sum, the

---

<sup>5</sup>Virginia law holds a seller liable for the merchantability of goods only if there is a sale of goods. Va. Code. Ann. §§ 8.2-314, 8.2-106. A sale of goods consists of the passing of title from the seller to the buyer for a price. § 8.2-106.

court is unable to discern any close question of law or fact that the estate has asserted as a ground of recovery against Bourn, and the court will disregard her citizenship in determining whether there is diversity jurisdiction.

### **III.**

After two hearings and close examination of the estate's claim against Bourn, the court finds no close question of law or disputed fact resulting in her liability to the estate and concludes that the estate joined Bourn as a party solely for the purpose of defeating diversity jurisdiction. Accordingly, the court denies the estate's motion to remand this action to state court.

**ENTER** this \_\_\_\_\_ day of January, 2003.

---

CHIEF UNITED STATES DISTRICT JUDGE

WACHOVIA BANK, N.A.,  
Administrator of the Estate of  
Susan Hale Young, Deceased,  
  
Plaintiff,  
  
v.  
  
RELLA BOURN, et al.,  
  
Defendants.

Civil Action No. 7:02CV00773

**ORDER**

By: Samuel G. Wilson  
Chief United States District Judge

**ENTER** this \_\_\_\_\_ day of January, 2003.

CHIEF UNITED STATES DISTRICT JUDGE